SUPREME COURT, U. S.

JAN 15 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-943

THE CITIZENS ENVIRONMENTAL COUNCIL, OAK PARK HOMES ASSOCIATION, CRAIGMONT HOMES ASSOCIATION, ROBERT J. McELWAIN, PHILLIP L. CARR, et al.,
Petitioners,

vs.

JOHN A. VOLPE, WILLIAM D. RUCKELSHAUS, and ROBERT MORRISSEY, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

Respondents-Intervenors, J. A. Tobin Construction Co., et al., hereinafter referred to as "Contractors", concur in petitioners' statement of Opinions Below, but call to the Court's attention that the opinion of the Court of Appeals is reported at 484 F.2d 870 and that the opinion of the District Court of Kansas is reported at 364 F.S. 286.

STATEMENT OF THE CASE

Contractors take issue with petitioners' statement of the case and deem it necessary to correct inaccuracies and omissions contained therein, specifically the argument and conclusions contained in the Statement of the Case, l.c. 3:

> "The corridor location was determined prior to the urbanization of this part of the Kansas City metropolitan area, *but the record* of the hearing conducted by the Kansas State Highway Commission on April 2, 1959, *is replete* with evidence that the area through which the proposed by-pass would travel was undergoing rapid development, both for residential and commercial uses." (Emphasis added)

In an effort to avoid duplication, contractors respectfully call to this Court's attention the concise statement of the material facts reported in *Citizens Environmental Council* v. *Volpe*, (D.Ct.Kan., 1973) 364 F.S. 286, at pages 290-295.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners present no questions for review which should be settled by the United States Supreme Court.

This Court has prescribed by rule the types of cases which will ordinarily call for the issuance of a writ of certiorari. Rule 19 provides, in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, in-

dicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners present only two questions for review. In both of them petitioners question whether a genuine issue of material fact was presented in the court below, which would have precluded the granting of summary judgment. In other words, petitioners are asking this Court to decide whether or not summary judgment was proper under the circumstances of this case. Petitioners cite no cases as authority for the proposition that summary judgment was not properly granted. They simply seek a further review by this Court of the same arguments they presented first to the District Court and then to the Court of Appeals.

The District Court decided that there was no genuine issue as to any material fact. That precise question was presented to the Court of Appeals for the Tenth Circuit and

it, too, concluded that there was no issue as to any material fact.

Notice is taken of the fact that petitioners do not suggest to the Court which of the criteria for the granting of a writ of certiorari they feel that their petition qualifies under. Only subpart (b) could be applicable in any view of the matter. Examination of those individual criteria, one by one, leads to the inescapable conclusion that petitioners do not make out a case for the exercise of discretion and granting of the writ prayed for. The first criteria is a conflict in the decisions of the courts of appeal on the same matter. Petitioners do not suggest that such a case is presented here, and we agree. The next criteria is a decision of an important state or territorial question in a way in conflict with applicable state or territorial law. Again, petitioners do not suggest that such a case is presented here, and we agree.

The next criteria is that an important question of federal law is presented which has not been, but should be, settled by this Court. Here also petitioners do not suggest that this is such a case. We agree in this regard also.

Next is a decision of a federal question in a way in conflict with applicable decisions of this Court. Petitioners do not point to any decisions of this Court on the granting of a motion for summary judgment which in any way conflicts with the decision of the District Court which was affirmed by the Court of Appeals.

Petitioners do not suggest that the decision of the District Court or the judgment of the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. We believe that the decision of the District Court and the affirmation of that decision by the Court of

Appeals was entirely within the well-defined ground rules for the granting of summary judgment.

Examination of the record before the District Court, *Citizens Environmental Council* v. *Volpe*, (D.Ct.Kan., 1973) 364 F.S. 286, demonstrates that the court properly determined that the case was ripe for summary judgment. Further, as noted by the Court of Appeals, Rule 56(e), F.R.C.P., required the entry of summary judgment. Petitioners, in the trial court, merely filed four identical (except for the name of affiant) generalized and conclusionary affidavits in opposition to the motion for summary judgment. They were clearly insufficient to raise a genuine issue of factual dispute. *Citizens Environmental Council* v. *Volpe*, (C.A.-10, 1973) 484 F.2d 870, 873.

In view of the District Court determination that no genuine issue of material fact existed and the Tenth Circuit Court of Appeals affirmation thereof, contractors respectfully submit that the criteria to be considered as announced in Rule 19, Supreme Court Rules, are not even remotely satisfied and a writ of certiorari should not issue.

CONCLUSION

Examination of the argument advanced by petitioners under both points discloses a thinly disguised re-argument of the merits of the case. The merits of the case were, after all, presented to the District Court on undisputed facts. Both of the contentions now being advanced, viz., that the Environmental Impact Statement was inadequate in certain respects, and that the part played by the Kansas State Highway Commission in the preparation of the Statement somehow made the Statement illegal, were both argued to the District Court and re-argued to the Court of Appeals. Both arguments were considered by the District Court and

the Court of Appeals, and ruled against petitioners in both instances.

It does not seem proper to seek a review of the merits of the affirmed judgment below under the guise of a complaint that the judgment was granted in summary fashion. The merits of the case are so ably set forth by the trial judge in his opinion, that it is not believed necessary to re-argue them here. Therefore, these respondents address themselves only to the points presented by petitioners, which only go to the question of whether summary judgment was proper in the circumstances of this case. Should the Court, however, in the exercise of its discretion, conclude to grant the writ, these respondents would brief the merits, as they firmly believe that the judgment of the District Court was correct.

Respectfully submitted,

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